

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANTE GAINES,

Plaintiff,

No. CIV S-05-0257 FCD KJM P

vs.

TOM CAREY, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Plaintiff has paid the filing fee.

Plaintiff's complaint states a cognizable claim for relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b) against defendants Kofed, Tan, Haku, and Roher. If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of the action. The Clerk of the Court will be directed to issue the appropriate number of summonses to plaintiff for purposes of service of process. See Federal Rule of Civil Procedure 4.

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1 Plaintiff shall complete service of process in accordance with Federal Rule of  
2 Civil Procedure 4 within sixty days from the date of this order, and shall file proof of service  
3 with the court within seventy days.<sup>1</sup> In effecting service, plaintiff shall serve a copy of this order  
4 on each defendant together with a summons and a copy of the complaint. Within 120 days from  
5 the date of this order, according to the schedule set forth below, plaintiff and defendants shall  
6 each submit to the court and serve by mail on all other parties a status report covering the  
7 following issues:

- 8 1. Whether this matter is ready for trial and, if not, why not;
- 9 2. Whether additional discovery is deemed necessary. If further discovery is  
10 deemed necessary, the party desiring it shall state the nature and scope of the discovery and  
11 provide an estimate of the time needed in which to complete it;
- 12 3. Whether a pretrial motion is contemplated. If any such motion is  
13 contemplated, the party intending to file it shall describe the type of motion and shall state the  
14 time needed to file the motion and to complete the time schedule set forth in Local Rule 78-  
15 230(m);
- 16 4. A narrative statement of the facts that will be offered by oral or documentary  
17 evidence at trial;
- 18 5. A list of all exhibits to be offered into evidence at the trial of the case;
- 19 6. A list of the names and addresses of all witnesses the party intends to call;
- 20 7. A summary of the anticipated testimony of any witnesses who are presently  
21 incarcerated;
- 22 8. The time estimated for trial;
- 23 9. Whether either party still requests trial by jury; and
- 24 10. Any other matter, not covered above, which the party desires to call to the

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25 <sup>1</sup> Plaintiff is cautioned that this action may be dismissed if service of process is not  
26 accomplished within 120 days from the date the complaint was filed. See Fed. R. Civ. P. 4(m).

1 attention of the court.

2           The parties are informed that they may, if all consent, have this case tried by a  
3 United States Magistrate Judge while preserving their right to appeal to the Circuit Court of  
4 Appeals. An appropriate form for consent to trial by a magistrate judge is attached. Any party  
5 choosing to consent may complete the form and return it to the clerk of this court. Neither the  
6 magistrate judge nor the district judge handling the case will be notified of the filing of a consent  
7 form unless all parties to the action have consented.

8           Finally, plaintiff has requested the appointment of counsel. The United States  
9 Supreme Court has ruled that district courts lack authority to require counsel to represent  
10 indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298  
11 (1989). In certain exceptional circumstances, the court may request the voluntary assistance of  
12 counsel under 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);  
13 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court  
14 does not find the required exceptional circumstances. Plaintiff's request for the appointment of  
15 counsel will therefore be denied.

16           In accordance with the above, IT IS HEREBY ORDERED that:

17           1. The Clerk of the Court is directed to issue and send plaintiff four summonses,  
18 for defendants Kofoed, Tan, Naku and Rohrer. The Clerk shall also send plaintiff five copies of  
19 the form "Consent to Proceed Before United States Magistrate Judge" with this order.

20           2. Plaintiff shall complete service of process on the defendants within sixty days  
21 from the date of this order. Plaintiff shall serve a copy of this order and a copy of the form  
22 "Consent to Proceed Before United States Magistrate Judge" on each defendant at the time the  
23 summons and complaint are served. Plaintiff shall file proof of such service within seventy days  
24 from the date of this order.

25           3. Defendants shall respond to the complaint within the time provided by the  
26 applicable provisions of Fed. R. Civ. P. 12(a).

1           4. Plaintiff's status report shall be filed within ninety days from the date of this  
2 order. Defendants' status report shall be filed within thirty days thereafter. The parties are  
3 advised that failure to file a status report in accordance with this order may result in the  
4 imposition of sanctions, including dismissal of the action and preclusion of issues or witnesses.

5           5. Unless otherwise ordered, all motions to dismiss, motions for summary  
6 judgment, motions concerning discovery, motions brought under Rules 7, 11, 12, 15, 41, 55, 56,  
7 59 and 60 of the Federal Rules of Civil Procedure, and motions under Local Rule 11-110 shall be  
8 briefed under Local Rule 78-230(m). Failure to oppose such a motion timely may be deemed a  
9 waiver of opposition to the motion. Opposition to all other motions need be filed only as  
10 directed by the court.

11           6. If plaintiff is released from prison at any time during the pendency of this case,  
12 any party may request application of other provisions of Local Rule 78-230 in lieu of Local Rule  
13 78-230(m). In the absence of a court order granting such a request, the provisions of Local Rule  
14 78-230(m) will govern all motions described in #5 above regardless of plaintiff's custodial status.  
15 See Local Rule 1-102(d).

16           7. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003), cert.  
17 denied sub nom. Alameda v. Wyatt, 124 S. Ct. 50, \_\_\_ U.S. \_\_\_ (2003), plaintiff is advised of the  
18 following requirements for opposing a motion to dismiss for failure to exhaust administrative  
19 remedies made by defendant under non-enumerated Rule 12(b) of the Federal Rules of Civil  
20 Procedure. Such a motion is a request for dismissal of unexhausted claims without prejudice.  
21 The defendant may submit affidavits or declarations under penalty of perjury and admissible  
22 documentation to support the motion to dismiss. To oppose the motion, plaintiff may likewise  
23 file declarations under penalty of perjury and admissible documentation. Plaintiff may rely upon  
24 statements made under the penalty of perjury in the complaint if the complaint shows that  
25 plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's attention  
26 those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one or more

1 affidavits or declarations by other persons who have personal knowledge of relevant matters.  
2 Plaintiff may also rely upon written records, but plaintiff must prove that the records are what  
3 plaintiff claims they are. If plaintiff fails to contradict defendant's evidence with admissible  
4 evidence, the court may rely on the defendant's evidence. In the event both sides submit matters  
5 outside the pleadings, the court may look beyond the pleadings and decide disputed issues of  
6 fact. If plaintiff does not serve and file a written opposition to the motion, the court may  
7 consider the failure to act as a waiver of opposition to the defendant's motion. If the defendant's  
8 motion to dismiss, whether opposed or unopposed, is granted, plaintiff's unexhausted claims will  
9 be dismissed without prejudice.

10           8. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
11 cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),  
12 plaintiff is advised of the following requirements for opposing a motion for summary judgment  
13 made by defendants under Rule 56 of the Federal Rules of Civil Procedure. Such a motion is a  
14 request for an order for judgment in favor of defendants without trial. A defendant's motion for  
15 summary judgment will set forth the facts that the defendants contend are not reasonably subject  
16 to dispute and that entitle the defendants to judgment. To oppose a motion for summary  
17 judgment, plaintiff must show proof of his or her claims. Plaintiff may do this in one or more of  
18 the following ways. Plaintiff may rely upon statements made under the penalty of perjury in the  
19 complaint if the complaint shows that plaintiff has personal knowledge of the matters stated and  
20 plaintiff calls to the court's attention those parts of the complaint upon which plaintiff relies.  
21 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that  
22 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must  
23 have personal knowledge of the facts stated. Plaintiff may rely upon written records, but plaintiff  
24 must prove that the records are what plaintiff claims they are. Plaintiff may rely upon all or any  
25 part of the transcript of one or more depositions, answers to interrogatories, or admissions  
26 obtained in this proceeding. If plaintiff fails to contradict the defendants' evidence with

1    counteraffidavits or other admissible evidence, the defendants' evidence may be taken as the  
2    truth and the defendants' motion for summary judgment granted. If there is some good reason  
3    why such facts are not available to plaintiff when required to oppose a motion for summary  
4    judgment, the court will consider a request to postpone considering the defendants' motion. If  
5    plaintiff does not serve and file a written opposition to the motion or a request to postpone  
6    consideration of the motion, the court may consider the failure to act as a waiver of opposition to  
7    the defendants' motion. If the defendants' motion for summary judgment, whether opposed or  
8    unopposed, is granted, judgment will be entered for the defendants without a trial and the case  
9    will be closed.

10           9. A motion or opposition supported by unsigned affidavits or declarations will  
11   be stricken.

12           10. Each party shall keep the court informed of a current address at all times  
13   while the action is pending. Any change of address must be reported promptly to the court in a  
14   separate document captioned for this case and entitled "Notice of Change of Address." A notice  
15   of change of address must be properly served on other parties. Pursuant to Local Rule 83-182(f),  
16   service of documents at the record address of a party is fully effective. Failure to inform the  
17   court of a change of address may result in the imposition of sanctions including dismissal of the  
18   action.

19           11. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of  
20   Court.

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1           12. The failure of any party to comply with this order, the Federal Rules of Civil  
2 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but  
3 not limited to, dismissal of the action or entry of default. Fed. R. Civ. P. 11; Local Rule 11-110.

4           13. Plaintiff's request for the appointment of counsel is denied.

5 DATED: December 29, 2005.

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9 UNITED STATES MAGISTRATE JUDGE  
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